IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA

In the matter of an Appeal made under Section 331 of the Code of Criminal Procedure Act No. 15 of 1979.

Hon. Attorney General,
Attorney General's Department,
Colombo 12.

Complainant

Vs

1. Sinhadhipathy Manchanayake Appuhamilage Shantha *alias* Kaluwa *alias* Sinhadhipathy Manchanayake Appuhamilage Sunil Shantha

2. Sinhadhipathy Manchanayake Appuhamilage Jayaman Ranaweera

3. Samantha Premalal Wijesinghe Gunawardhane

4. Yapa Appuhamilage Ravindra Nalaka Priyankara

5. Yapa Appuhamilage Lakshman Anura Nishantha

6. Agnus Seneviratne (deceased)

Court of Appeal Case No: **CA/HCC/293-295/25**

High Court of Gampaha Case No: **238/2004**

7. Lakshman Arachchilage Irin Hemalatha (deceased)

8. Lakshman Arachchilage Priyanthi Swarnalatha

9. Lakshman Arachchilage Lalith Pushpa Kumara

10. Sinhadhipathy Manchanayake Appuhamilage Sumudu Sanjeewa

11. Hetti Thanthirilage Pushpa Kumara

12. Uda Wewala Gedara Nishantha Rohana Wimalasiri

13. Rajapaksha Pathirannehelage Munasinghe

14. Uda Wewala Gedara Prasanna Wimalasiri

15. Lakshman Arachchilage Chandralal Premasiri

16. Sinhadhipathy Manchanayake Appuhamilage Susantha *alias* Sinhadhipathy Manchanayake Appuhamilage Susantha Priyathilake

Accused

AND NOW BETWEEN

1. Sinhadhipathy Manchanayake Appuhamilage Shantha *alias* Kaluwa *alias* Sinhadhipathy Manchanayake Appuhamilage Sunil Shantha

2. Sinhadhipathy Manchanayake Appuhamilage Jayaman Ranaweera

3. Sinhadhipathy Manchanayake Appuhamilage Susantha *alias* Sinhadhipathy Manchanayake Appuhamilage Susantha Priyathilake

Accused – Appellants

Vs

Hon. Attorney General,
Attorney General's Department,
Colombo 12.

Complainant - Respondent

Before : **P. Kumararatnam, J.**

Pradeep Hettiarachchi, J.

Counsel : Sarath Jayamanne, PC, with Vineshka Mendis, Sajeewa Meegahawaththa, Anjuna Wilwalaarachchi, Uvindu Bandara and Himalshi Fernando for the 1st Accused – Appellant.

: Anil Silva, PC with Isuru Jayawardena for the 2nd Accused-Appellant

: Saliya Pieris, PC, with Geeth Karunarathna, Manujaya de Silva, and Dhimarsha Marso for the 3rd Accused-Appellant.

: Sanjeewa Dissanayake, D.S.G. for the Respondent.

Argued on : 01.06.2026

Decided on : 12.06.2026

Pradeep Hettiarachchi, J

Judgment

1. This is a revised judgment delivered by the same bench pursuant to an application made by the Learned Counsel appearing for the 1st, 2nd and 3rd Accused-Appellants (hereinafter referred to as "the Appellants") seeking to correct the judgment dated 27.05.2026 on the basis that certain findings in respect of a crucial matter in the said judgment have been made *per incuriam.*

2. The material facts relevant to this revised judgment may be briefly stated as follows;

3. In the present case, 16 accused were indicted on nine counts before the High Court of Gampaha. The trial was conducted before the Learned High Court Judge without a jury. At the conclusion of the trial, the Learned Trial Judge found the 1st, 2nd, and 16th Accused guilty on Counts 1, 2, 3, 4, and 5, and accordingly convicted and sentenced them to death. The remaining accused were acquitted of all charges.

4. Being aggrieved by the said conviction and sentence, the Appellants preferred an appeal to the Court of Appeal against the judgment of the High Court of Gampaha in the case No. 283/2004. Upon conclusion of submissions, the judgment was delivered on

27.05.2026, whereby the appeal was dismissed, and the judgment of the Learned High Court Judge of Gampaha was affirmed.

5. The Appellants did not thereafter make an application for special leave to appeal to the Supreme Court against the said judgment of this Court.

6. In lieu thereof, on the same date, the Learned Counsel for the 3rd Appellant filed a motion seeking permission of this Court to make an application in terms of Rule 22(1) of the Supreme Court Rules, 1990.

7. Consequently, the matter was taken up in open court on the same day, and this Court granted the 3rd Appellant permission to proceed with an application under Rule 22(1)(ii). The matter was fixed for oral submission on 01.06.2026.

8. On 01.06.2026, in the course of submissions made before this Court, the Learned Counsel for all the Appellants invited this Court to consider setting aside the judgment dated 27.05.026, on the ground that the said judgment had been given *per incuriam*.

9. In support of the said application, the Learned Counsel appearing for the Appellants specially drew the attention of this Court to the findings contained in the impugned judgment concerning the constitution of the alleged unlawful assembly which are reproduced as follows;

> *"In these circumstances, the fact that only three accused were ultimately convicted, while the remaining accused were acquitted, does not, in my view, constitute an error of law. The evidence clearly establishes, beyond a reasonable doubt, that more than five persons were involved in the incident, thereby satisfying the essential elements of an unlawful assembly.*
>
> *More importantly, the prosecution's evidence established unarguably that the crowd gathered at the scene used to shout and pelt stones, damaging the deceased's property. Thus, it establishes beyond a reasonable doubt that they were acting in furtherance of the common object of committing the offences stipulated in the indictment, which further evidences that the necessary*

components of an unlawful assembly were present. Therefore, the Trial Judge's conclusion that the 1st, 2nd, and 16th Appellants were present together with other unidentified members of the said unlawful assembly and had committed the offences stipulated in the indictment is legally sustainable. Accordingly, the conviction under the relevant provisions is legally sustainable." (vide page 8 of the impugned judgment dated 27.05.2026)

10. The Learned Counsel for the Appellants further invited the attention of this Court to Section 138 of the Penal Code, which defines an unlawful assembly. In terms of the said statutory provision, an "unlawful assembly" consists of an assembly of five or more persons formed with any of the common objects stipulated in the said Section.

11. It was submitted that the plain language of the provision makes it a legal requirement that at least the presence of five persons must be established in order to constitute an unlawful assembly.

12. It is also necessary to note that the concept of "unlawful assembly" has been considered in several decisions of the superior courts of Sri Lanka, which have consistently emphasized the requirement as to its legal composition.

13. In this regard, the following binding authorities are of much relevance.

14. In ***Jayaram vs. Saraph*** 56 NLR 22, Pulle J held as follows;

"In the present case the charges clearly informed the six accused persons that they formed the unlawful assembly. The evidence was also to the same effect, namely, that only six persons took part in the assault and that these persons were the accused. The finding of fact that the 3rd to 6th accused were not members of any unlawful assembly, should have resulted in the verdict that the charges against the 1st and 2nd accused were not proved."

15. Further, in the same judgment, citing the opinion of Soertez J, in the Case of ***Rex vs. Dias*** (1935) 17 Ceylon Law Recorder 16, held as;

"It will be seen, therefore, that the opinion of Soertsz J. appears to be that if a number of persons are charged as having "formed" the unlawful assembly, a conviction of at least five is necessary to sustain that conviction. Whereas, if the charge against them was that they were members of an unlawful assembly, a conviction of less than five of those charged could be supported, if there was evidence that others besides those acquitted constituted an unlawful assembly along with those who were convicted."

16. In The **Queen vs. Thiagarajah** 57 NLR 58, held as follows;

"The offence punishable under sections 140,144 and 146 of the Penal Code on which the Magistrate committed the prisoners for trial in obedience to the Attorney General's final instructions were clearly different from those which were originally "under inquiry." An allegation that a man was a member of an unlawful assembly of 5 consisting of himself and four named persons is not the same as an allegation that he was a member of an unlawful assembly of 5 consisting of himself, three named persons and "a person unknown to the prosecution." just as it requires at least two persons to form a criminal conspiracy punishable under section 113B of the Penal Code, the offence of being a member of an unlawful assembly cannot be committed except in association with 4 others. The acquittal of one or two accused persons on a conspiracy charge therefore necessarily results in the acquittal of the other unless the indictment or charge specifically alleged (and it is proved) that some one else, known or unknown, had also participated in the crime. The King vs. Dharmasena [(1950) 52 NLR 481]. The same principle applies mutatis mutandis, to an indictment or charge alleging participation in an unlawful assembly." (emphasis added)

17. In ***CA/HCC/231-235/15***, decided on 22.06.2023, held by Sasi Mahendran, J. as follows;

"Therefore, we hold that 1st, 3rd (now deceased) and the 4th Accused shared the common murderous intention to kill, one Roshan Lasantha Gomas alias Shan. The 1st and 4th Accused were also convicted for the first count and second count, that is based on unlawful assembly. Since the 2nd, 5th and 6th Accused were

acquitted for all counts, including unlawful assembly, and also without the phrase in the indictment that is "with those unknown to the prosecution", whether this court affirms the conviction only against the 1st, 4th along with 3rd (deceased) for unlawful assembly. This court is mindful that to form unlawful assembly, there should be five or more persons according to Section 138 of the Penal Code."

18. In further support of this contention, the Learned Counsel referred this Court to the express wording of the charge contained in the indictment, which is reproduced below;

"වර්ෂ 1997 ක් වූ මාර්තු මස 17 වන දින හෝ ඊට ආසන්න දිනයක මෙම අධිකරණයෙහි බලසීමාව තුල පිහිටි යක්කල බෝගමුවහි දී ***යුෂ්මතුන්*** *ජයසුන්දර පතිරන්නැහැලාගේ චිත්‍රා ජයසුන්දර නමැති යට තුවාල සිදු කිරීම හා ඇගේ නිවසට අලාභ සිදු කිරීම පොදු අරමුණ කරගත් නීති විරෝධී රැස්වීමක සාමාජිකයන් වීමෙන් දණ්ඩ නීති සංග්‍රහයේ 140 වන වගන්තිය යටතේ දඩුවම් ලැබිය යුතු වරදක් සිදු කළ බවය."*

19. The Learned Counsel for the Appellants submitted that the indictment specifically alleged that the unlawful assembly consisted solely of the 16 Accused persons named therein and did not contain the qualifying expression "together with persons unknown to the prosecution." It was therefore contended that the charge was confined exclusively to the participation of the named Accused in the alleged unlawful assembly.

20. Counsel further argued that the charge unequivocally informed the 16 Accused persons that they themselves constituted the unlawful assembly. It appeared that, in the impugned judgment, the Court's attention was not sufficiently drawn to the legal significance of the precise wording of the indictment and the binding authorities governing the issue. As a result, the Court affirmed the convictions of the present Appellants notwithstanding the acquittal of the remaining Accused persons whose participation was essential to constitute the unlawful assembly alleged in the indictment.

21. It was therefore submitted that this omission was not merely an error in reasoning or an incorrect appreciation of the law. Rather, it amounted to a failure to consider a material

aspect of the indictment and the binding authorities directly governing the issue. The impugned judgment was therefore rendered through inadvertence and in ignorance of relevant binding legal principles. The Learned Counsel contended that such omission brought the impugned judgment squarely within the ambit of the doctrine of *per incuriam*.

22. The Learned Counsel appearing for the Appellants further relied on the decisions of the Supreme Court in ***Billimoria vs. Minister of Lands and Land Development and Mahaweli Development and 2 Others*** (1978-79-80) 1 Sri L.R. 10 and ***Jeyarai Fernandopulle vs Premachandra de Silva and Others*** (1996) 1 Sri L.R. 70, submitting that this Court possesses inherent jurisdiction to correct or set aside its own orders in appropriate circumstances.

23. In ***Jeyarai Fernandopulle vs Premachandra de Silva and Others*** *(supra),* it was recognized that all courts have inherent power in certain circumstances to revise orders made by them. Such as, where a clerical mistake in a judgment or order results from an accidental slip or omission may be corrected; or to vary its own orders in such a way as to carry out its own meaning and where the language is doubtful, to make it plain or to amend it where a party has been wrongly named or described, but not if it would change the substance of the judgment, the attainment of justice being a guiding factor.

24. Dealing with the meaning of *per incuriam*, *per incuriam* is a Latin legal phrase meaning *"through lack of care"* or *"through inadvertence"*, which can be interpreted as a judicial decision that is mistakenly made because the Court inadvertently overlooked an applicable statute, rule, or binding precedent.

25. According to *Black's Law Dictionary* (Fourth Edition, 1891), *per incuriam* means "through inadvertence."

26. Further, in the case ***Kariawasam vs. Priyadharshani*** (2004) 1 Sri. L.R.192, it was stated there at page 113, et seq., that 'Earl Jowitt in his Dictionary of English Law (2nd Ed, 1997, Vol 2 p 1347) translates the phrase to mean *"through want of care."* He goes on to explain that a decision or dictum of a judge which clearly is the result of some oversight is said to have been given *per incuriam*.

27. In the case ***Gunasena vs. Bandaratillake*** (2001) 1 Sri. L.R.302, Wijetunga J, observed the phrase *per incuriam* has been defined in 'Whertons' Law Lexicon, 13th edition at page 645, as *"through want of care."* An order of the Court obviously made through some mistake or under some misapprehension is said to be made *per incuriam*.

28. Accordingly, a decision should be treated as given *per incuriam* when it is given in ignorance of the terms of a statute, or of a rule having the force of a statute. A decision of the court is not a binding precedent if given *per incuriam,* that is, without the court's attention having been drawn to the relevant binding authorities or statutes.

29. In classical legal scholarship, the phrase denotes a judgment rendered by a court in ignorance or forgetfulness of an applicable statutory provision or a binding judicial precedent that would have fundamentally altered the outcome of the case.

30. The classic, restrictive definition was famously articulated by Lord Chief Justice Goddard, in the English case of ***Huddersfiled Police Authority vs. Watson*** (1947) 2 ALL ER 193, where it was held as follows;

> *"What is meant by given a decision per incuriam is giving a decision when a case or statute has not been brought to the attention of the court, and they have given the decision in ignorance or forgetfulness of the existence of that case or that statute."*

31. Accordingly, Lord Chief Justice Goddard restricted the doctrine to cases where a statute or binding authority was simply not brought to the Court's attention, leading the Court to decide the matter in ignorance or forgetfulness of its existence.

32. Further, the following authorities are pertinent to the interpretation and application of this narrow definition.

33. In ***Young vs. Bristol Aeroplane Co. Ltd*** (1944) K.B. 718 at 729, held as follows;

> *"It cannot... be right to say that in such a case (where the court is satisfied that an earlier decision was given in ignorance of the terms of a statute or a rule having the force of a statute) the court is entitled to disregard the statutory provision and is bound to follow a decision of its own given when that provision was not present to its mind. Cases of this description are examples of decisions given per incuriam. We do not think that it would be right to say that there may not be other cases of decisions given per incuriam in which this court might properly consider itself entitled not to follow an earlier decision of its own. Such cases would obviously be of the rarest occurrence and must be dealt with in accordance with their special facts."*

34. In ***Billimoria vs. Minister of Lands and Land Development and Mahaweli Development and 2 others*** *(supra)*, held as follows;

> *"The stay order was made after consideration and was therefore not made per incuriam. Whether Section 24 of the Interpretation Ordinance applied to stay orders or not was a moot point, which, even if decided wrongly would not make the order an order per incuriam. A stay order is an interim order and not one which finally decides in the case. This must be borne in mind when applying the principles of the per incuriam rule. It would not be correct to judge such orders in the same strict manner as a final order. The interests of justice required that a stay order be made as an interim measure."*

35. Having considered the authorities referred to above, it is evident that the doctrine *of per incuriam* applies where a court reaches a decision in ignorance of a relevant statutory provision, binding judicial authority, that would have had a decisive bearing on the outcome of the case.

36. In the present case, the indictment alleged that the unlawful assembly consisted solely of the 16 Accused persons named therein and did not contain any averment that the alleged unlawful assembly included persons unknown to the prosecution.

37. Furthermore, the binding authorities governing the composition of an unlawful assembly, particularly *Jayaram vs. Saraph* and *The Queen vs. Thiagarajah*, and other decisions referred to above, make it clear that where the charge is confined to the named Accused persons, the acquittal of other Accused so as to reduce the membership of the alleged assembly below the statutory minimum necessarily affects the sustainability of the convictions of the remaining Accused.

38. It appears that in the impugned judgment, the Court's attention was not sufficiently drawn to the legal significance of the wording of the indictment and the binding precedents arising from the aforesaid authorities. Consequently, the Court affirmed the convictions of the Appellants notwithstanding the acquittal of the remaining accused persons whose participation was essential to constitute the said unlawful assembly.

39. In these circumstances, I am satisfied that the impugned judgment was rendered through inadvertence and without due consideration of material and binding legal precedents directly applicable to the issue before this Court. The omission was of such a nature that, had the relevant statutory requirements and binding authorities been fully considered, a different conclusion would necessarily have followed.

40. Accordingly, I hold that the impugned judgment dated 27.05.2026 was delivered *per incuriam*, thereby warranting the exercise of this Court's inherent jurisdiction to correct the error in order to prevent a miscarriage of justice.

41. Having set out the meaning of the doctrine of *per incuriam*, I now turn to consider the circumstances in which the doctrine becomes applicable. The authorities demonstrate that a decision will be treated as having been rendered *per incuriam* where the Court, through inadvertence or oversight, has decided a matter in ignorance of a binding statutory provision, a **binding precedent** that would have had a decisive bearing on the outcome of the case.

42. In ***Billimoria vs. Minister of Lands and Land Development and 2 Others*** *(supra),* Samarakoon J held the instances where the principle of *per incuriam* applies by citing the case of ***Young vs. Bristol Aeroplane Co. Ltd*** *(supra)* as follows;

"In Young v. Bristol Aeroplane Co. Ltd. (66) Greene M.R. pointed particularly to the classes of decisions per incuriam: -

(i) a decision in ignorance of a previous decision of its own Court or of a Court of co-ordinate jurisdiction covering the case, and,

(ii) a decision in ignorance of a decision of a higher Court covering the case which binds the lower Court.

Lord Denning, M. R. was inclined to add another category of decisions-one where a long-standing rule of the common law has been disregarded because the Court did not have the benefit of a full argument before it rejected the common law." (at page 300)

43. In ***Hyder Consulting Co. Ltd vs. State of Orissa*** *(2015) 2 SCC 189*, held as follows;

"I am of the considered view that a prior decision of this Court on identical facts and law binds the Court on the same points of law in a later case. In exceptional circumstances, where owing to obvious inadvertence or oversight, a judgment fails to notice a plain statutory provision or ***obligatory authority*** *running counter to the reasoning and result reached, the principle of per incuriam may apply." (emphasis added)*

44. Applying these principles to the present case, the circumstances in the instant case fall squarely within the recognized categories of decisions rendered *per incuriam*. The impugned judgment was delivered in ignorance of binding legal precedents governing the issue in dispute; this Court is satisfied in invoking the doctrine of *per incuriam* accordingly.

45. The Court recognizes that if its own prior judgment was delivered *per incuriam*, it has the inherent power to recall, vacate, or set aside that judgment. In the case of ***SC/Appeal/6/83***, it is identified *per incuriam* as an instance where the court can exercise its inherent jurisdiction. In this case, it was held as follows;

"It is thus seen that this court has an inherent jurisdiction in situations;

1) *Where decisions have been made per incuriam;*

2) *Where the Court has violated a principle of natural justice;*
3) *Where the Court is required to act in aid of justice;*
4) *Where a claim is made for costs and,*
5) *Where a party is entitled to move the Court ex debito justitiae."*

46. In ***Moosajees Ltd vs. Fernando,*** 68 NLR 414, held as follows;

> *"This Court has also exercised an inherent power to correct error in a judgment which has occurred per incuriam. I doubt whether this power is exercisable only by the Judge who had pronounced the judgment; for if so there would be no means of correcting even a manifest clerical error discovered in a judgment after the death or retirement of the judge who pronounced it."*

47. Further, in the case of ***Ranmenikhamy vs. Thisera*** 65 NLR 214, held *that "…….. Inasmuch as the order rejecting the appeal was made per incuriam, the Court had inherent jurisdiction to set aside its own order."*

48. In ***Ganeshanadan vs. Vivienne Goonewardena and 3 Others*** (1984) 1 Sri L.R. 319, held as follows;

> *"This court has no jurisdiction to act in revision of cases decided by itself. Nevertheless, the court went on to hold that as a superior court of record it has inherent powers "to make corrections to meet the ends of justice" and that those powers have been used "to correct errors which were demonstrably and manifestly wrong and where it was necessary in the interests of Justice to put matters right."*

49. In ***Billimoria vs. Minister of Lands and Lands Development and Mahaweli Development and 2 Others*** *(supra),* it was held as follows;

> *"Observed that while it was competent for one Bench to set aside an order made per incuriam by another bench of the same court, it has been the practice for parties or their counsel to bring the error to the notice of the Judge or Judges who made the order so that he or they can correct the error."*

50. The authorities considered above established that although a superior court is not vested with general power of revision over its own final judgments, nevertheless it retains an inherent jurisdiction to recall, vacate, or set aside a judgment rendered *per incuriam.* This jurisdiction, however, is not exercised as a matter of appellate review but in order to prevent injustice arising from manifest error, oversight, or inadvertence, and to ensure that the Court's process is not used to perpetuate a legally unsustainable decision.

51. However, it was formulated in the case of ***All Ceylon Commercial and Industrial Workers Union vs. Ceylon Petroleum Corporation and Another*** *(1995) 2 Sri L.R. 295*,

> *"The inherent powers to correct its errors are adjuncts to existing jurisdiction to remedy injustice - they cannot be made the source of New jurisdiction to revise a judgment rendered by that court."*

52. Further, it should be noted that a difference of opinion regarding statutory interpretation or the application of a precedent does not constitute a "lack of care" or "oversight" and result in the decision being deemed *per incuriam*. This was affirmed in the case of ***Senarath vs. Chandraratne, Commissioner of Excise and Others*** *(1995) 1 Sri L.R. 210*, which held as follows;

> *"Whether the question is one of interpretation, the order cannot be one made per incuriam."*

53. It should be noted that in the view of the above authorities, it is evident that the doctrine of *per incuriam* is of a strictly limited and exceptional character. It cannot be invoked merely because a different view on statutory interpretation is possible, nor can it be used as a mechanism to reopen or revise concluded judgments under the guise of inherent jurisdiction.

54. Accordingly, it is clear that the application of the doctrine of *per incuriam* is confined to the rarest of rare circumstances, where a decision has been rendered in clear ignorance of binding precedents or binding statutory provisions.

55. In the present case, this Court has already determined that the impugned judgment dated 27.050.2026 was delivered without due consideration of the legal effect of the indictment and the binding authorities governing the constitution of an unlawful assembly. Such omission goes to the root of the reasoning and outcome of the decision and accordingly brings the present case within the recognized ambit of *per incuriam*. In these circumstances, this Court is entitled to invoke its inherent jurisdiction to revise the impugned judgment in the interest of justice.

56. For the foregoing reasons, I am satisfied that the impugned judgment dated 27.05.2026 was delivered *per incuriam*, having been made without due consideration of the legal effect of the indictment and the binding authorities governing the constitution of an unlawful assembly under Section 138 of the Penal Code. The said omission goes to the root of the reasoning adopted in the earlier judgment and has materially affected the conclusion reached therein.

57. Accordingly, acting in the exercise of the inherent jurisdiction of this Court, and in order to prevent a miscarriage of justice, the judgment dated 27.05.2026 is hereby recalled and set aside. The appeal is accordingly allowed, and the Appellants are acquitted of all charges levelled against them.

Judge of the Court of Appeal

P. Kumararatnam, J

I agree,

Judge of the Court of Appeal